

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DE-)
PARTMENT OF PUBLIC HEALTH)
DIVISION OF RISK MANAGE-)
MENT,)

Petitioners,)

v.)

MURIEL WILCOX,)

Respondent,)
_____)

CASE NO. 70498

RESPONDENT'S REPLY BRIEF
ON JURISDICTION

ALFRED D. BIELEY, P.A.
ATTORNEY FOR RESPONDENT
211 BISCAYNE BUILDING
19 WEST FLAGLER STREET
MIAMI, FLORIDA 33130
(305) 373-8628

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JURISDICTIONAL STATEMENT

The Petitioners have invoked the jurisdiction of this Court pursuant to Rule of Appellate Procedure 9.120 and it is based upon the statement of the Petitioner alleging that the decision of the Third District Court of Appeal in the present case, is in express and direct conflict with the decision of the First District Court of Appeal in the case of Colonel's Table v. Malena 412 So.2d 64 (Fla. 1st DCA 1982); Lister v. Walker 409 So.2d 1153 (Fla. 1st DCA 1982); Harrell v. Florida State University 427 So.2d 1089 (Fla. 1st DCA 1983); Sherrod Drywall v. Reeves 378 So.2d 301 (Fla. 1st DCA 1979); Borden Inc. v. Butler 377 So.2d 795 (Fla. 1st DCA 1979); Florida Power & Light Co. v. Adkins 377 So.2d 57 (Fla. 1st DCA 1979); as well as the opinion of this Honorable Court in Meriwether v. Kilbee 18 So.2d 534 (Fla. 1944).

The decision of the Third District Court of Appeal in the instant case is not in conflict with all the cases cited by the Petitioner for the following reasons:

A. In the Harrell case a First District Court of Appeal

case where an appeal was taken directly from an Order of a Deputy Commissioner, the Court said that discovery of a greater amount of Social Security benefits by a compensation carrier is sufficient basis for modification of a compensation order in that the carrier has a continuing right and responsibility to compute the correct set-off at a time a payment is due. In the instant case this issue was never raised before the Deputy Commissioner when he entered his order awarding Workmen's Compensation benefits on February 5, 1985. The Harrell case is not in conflict with the decision of the Third District Court of Appeal in the instant case or the Third District Court of Appeal's opinion in the Troy Case (Troy Desk Mfg. Co., Inc. v. Troy, 448 So.2d 46, Third District Court of Appeal 1984).

B. In another case cited by the Petitioner as Florida Power and Light v. Adkins, supra, an appeal was taken by the Employer to review the decision of a Judge of Industrial Claims relative to a Social Security off-set. This too, had to do with an appeal by an Employer from an Order by a Deputy Commissioner (Judge of Industrial Claims) and it involves an appeal in the case-in-chief and not upon an ancillary matter that was never raised before the Deputy Commissioner. The Adkins, case, supra is not applicable to the instant situation.

C. In the Sherrod, case, supra, a First District Court of Appeal decision in 1979, involves an appeal from an Order of Deputy Commissioner regarding an issue of set-off of Social Security benefits which matter was raised before the Deputy Commissioner and was an issue in the case-in-chief and not first brought to the Court on an ancillary proceeding under a Rule

Nisi. The Sherrod case just cited, is also not relevant by reason of this factual dissimilarity and so it is the Petitioner is in error again.

D. Petitioner cites the Lister case, supra, which is also a direct appeal from an order originating before the Deputy Commissioner and where in the case-in-chief a set-off was sought retroactively. In the Lister case, this set-off was taken and was part of the claim-in-chief before the Deputy Commissioner and not an ancillary proceeding as in the instant case.

E. The Petitioner cites the Meriwether case, supra, as being in conflict with the instant decision. The Meriwether case has to do with lands acquired by a drainage district by foreclosing drainage tax liens which were not subject to execution to satisfy a common law judgment against the district. I see nothing in the Meriwether case nor do I understand the basis for it being cited by the Petitioner as constituting a 'conflict' with the instant case that is sought to be reversed by the Petitioners.

F. Finally they refer to the Malena case, supra, which also involves a Employer/Carrier attempting to take a set-off in the main claim of a Workers' Compensation hearing before a Deputy Commissioner.

The Malena case has to do with the set-off in a proceeding before a Deputy Commissioner and not in an ancillary proceeding under a Rule Nisi as brought in the instant case and as such, has no relevancy or materiality to the present matter.

Finally I would say the Petitioner in the instant case has

filed a Petition with the Office of the Deputy Commissioner to modify the award based on the ruling of the Third District Court of Appeal, to modify the original award by the Deputy Commissioner which Order is dated February 5, 1985. (See Appendix 1 & 2).

It seems to the writer that by the Petitioner in this cause having filed such a Petition and Request for Hearing on the Petition to Modify the Deputy Commissioner's Order of February 5, 1985, that they have waived their right to appeal (Concord Realty Corp. v. Romano 30 So.2d 495, Supreme Court 1947 & Davis v. Combination Awning Shutter Co. 62 So.2d 742, 744, Supreme Court 1953) to this Honorable Court since they have in effect, accepted the provisions of the Order and now they wish to modify it without paying it. Such a position can scarcely be countenanced in the law or in equity and constitutes a waiver and estoppel of their appeal herein.

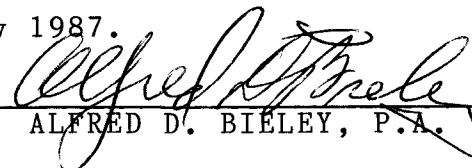
Jurisdiction does not lie and their Petition should be discharged.

Respectfully submitted.



ALFRED D. BIELEY, P.A.
Attorney for Respondent
211 Biscayne Building
19 West Flagler Street
Miami, Florida 33130
(305) 373-8628

I HEREBY CERTIFY that a foregoing copy of this Reply Brief was mailed to: Horace B. Yandle, Esq. of Vernis & Bowling, P.A., Attorneys for Petitioners, 2398 South Dixie Highway, Miami, Florida, 33133 this 21 day of May 1987.



ALFRED D. BIELEY, P.A.